No. 17318

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Joe Goldstein and Lillian Goldstein,

Petitioners,

vs.

Commissioner of Internal Revenue,

Respondent.

Reply Brief of Petitioners Joe Goldstein and Lillian Goldstein.

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Introduction.

The record discloses only one genuine issue, which is properly a question of law despite the repeated assertions by the Tax Court and the respondent that it is a question of fact: Whether $40,000.00 of the $75,000.00 paid by the Boys' Market, Inc. for the San Gabriel property was gain to the petitioners, or whether it was a distribution by the corporation in view of the favorable lease. The question was resolved by the Tax Court in the form of a fact finding. Actually it was a legal determination since there were no real fact issues. The findings of the Tax Court, although not complete, were consistent with the petitioners' position until the final determination that the $40,000.00 represented a distribution of corporate earnings.

The additional factors which the Tax Court simply disregarded in its findings are: the valid business pur-

pose of the corporation for acquiring the land; the valid business reason of the petitioners to acquire the leased property and be freed from contingent liability; the valid exercise of managerial discretion by the corporate directors in deciding that the corporation could not acquire the land from the lessor on the lessor's terms; and the monetary value of the land to the corporation. These ultimate facts were inescapable under the evidence which the Tax Court was bound to accept under well established rules hereinafter discussed. These ultimate facts clearly refute the inferences drawn by the Tax Court and the respondent. Without such inferences, there is no basis for the Tax Court's decision except as a determination of law.

Even on the basis of such inferences, there is no identifiable theory upon which to uphold the determination of the Tax Court as a fact finding. The specific findings of fact by that Court are in no way consistent with the application of the substance versus form theory of the Gregory decision, as that theory was formulated initially by the Supreme Court and uniformly interpreted thereafter. If the transactions were real, with substantive legal consequences, then any motive to avoid taxation is immaterial. See the discussion by Learned Hand in *Chisholm v. Comm.* (C. C. A. 2), 79 F. 2d 14, quoted in footnote 11 of the appendix.

The respondent seeks a rubber stamp of the Tax Court's so-called inference of fact, but the trend toward delegation of judicial responsibility to administrative agencies has been emphatically disapproved by Congress in the legislation curtailing the effect of the *Dobson* case. The purpose of administrative agencies is necessarily the collection of tax, not the formulation of rules to furnish taxpayers with guideposts. The Tax Court is often realistically described as a quasi administrative agency since its basic functions are the same as those exercised under its previous designation.

General acceptance by the Court of Appeals of arbitrary Tax Court determinations categoried as "inferences of fact" would cause confusion in the tax law, blurring its clear outlines and sacrificing long term revenue policy to immediate administrative expediency. Fortunately, this Court has not subscribed to that short-sighted view.

The issue raised by the evidence under applicable rules is a legal question since it can be generalized with all of the essential elements included. A corporation buys from its principal shareholder, its chief executive, property on which it has a long term lease at less than the current fair rental, and it pays a purchase price consistent with current fair rental. Does the gain to the shareholder by reason of the adjustment in purchase price to fair market value, consistent with currrent fair rental, constitute a disguised dividend? The Tax Court held "yes" in the instant matter.

It will be shown herein, however, that in analogous situations the courts hold that the corporation does not pay a dividend when it receives or has received fair value in exchange, even though the payment is voluntary and could have been avoided or reduced by insistence upon the corporation's legal rights. It will also be shown that there can be no taxable dividend without a corresponding reduction of the corporation's assets. There is no such reduction when the corporation buys property at a price based on its current fair marke value.

Although the error of the Tax Court appears to be basically one of substantive law, the Tax Court also erred by substituting inference for direct and uncontroverted testimony. The uncontroverted and unimpeached testimony showed valid business reason for the Boys' Market, Inc., to refuse to deal with the Torley Land Company; for the petitioners to acquire the San

Gabriel property; and for the Boys' Market, Inc. to acquire such property. Such testimony also showed that the value of the land to the Boys' Market was $75,000.

Points Made in Opening and Answer Briefs.

The brief of the respondent freely draws inferences contrary to the evidence, based largely on the undisputed facts that Joe Goldstein was the controlling shareholder and the chief executive of the corporation, and freely speculates on the basis of such inferences. Moreover, clearly stated testimony is misinterpreted with respect to the reasons for the corporation's acquisition of the land. On page 16 of the respondent's brief, the testimony of Edward L. Eddy is discussed, and an effort is made to show an inconsistency in the purpose to acquire the land in order to effect a sale and leaseback of the entire property, and the collateral or alternative purpose to improve the borrowing capacity of the corporation. Obviously no such inconsistency exists. The foregoing argument of the respondent appears to be the basis for his statement on page 10 of his brief that the sale and leaseback obliterated the reason advanced for the corporation's purchase of the property.

It has been demonstrated in the petitioners' opening brief that the Tax Court's decision cannot be sustained on any theory of agency, and the respondent agrees in his brief (p. 21) that there was no holding to that effect. Thus, *Utter-McKinley Mortuaries* (C. A. 9), 225 F. 2d 870 is entirely inapplicable to the instant situation, since that case is based on the ground that the officer-shareholder therein involved was in a fiduciary capacity and "As the agent of a separate entity capable of dealing independently, he would have been bound to give to it all the perquisites and advantages which he obtained."

Petitioners' opening brief discussed at length the motives of the Boys' Market, Inc. board of directors in declining to make the trade of real estate on the terms of the lessor, and at the same time emphasized that such motives are not material to the instant matter. The board was not required by any rule of law to have a business purpose for a negative decision on an offer. The rule of "substance v. form" does not apply to require such a business purpose inasmuch as there has been no contention by the respondent that the transactions herein involved were anything other than they purported to be, *i.e.,* actual sales in each case giving rise to substantive legal rights. Nevertheless, it was shown that the good faith of the directors and the candor of their testimony was never questioned by the respondent and the Tax Court. They only questioned the soundness of the directors' business judgment. Thus, even if business purpose were a relevant factor, the respondent and the Tax Court were usurping the well established province of management.

It was also brought out in the petitioners' opening brief that Congress has enacted specific legislation denying capital gain treatment when property is transferred to a controlled corporation under circumstances which do not apply to the instant matter. The respondent's position and the Tax Court's decision constitute an enlargement of the Congressional purpose contrary to basic principles of statutory construction.

Limitations on "Clearly Erroneous" Rule.

The respondent puts much weight on the proposition that the ultimate question herein is a question of fact, and that the Tax Court's findings are to be upheld unless clearly erroneous, even though the finding is based on inferences from basic facts. The Supreme Court decision which he cites, *Comm. v. Duberstein,* 363 U. S.

278, dealt with the narrow question of gifts vs. compensation and stated that the sole criterion was the "dominant reason that explains his action in making the transfer." In this context, the Court then discusses the "clearly erroneous" rule of Fed. Rules Civ. Proc., 52(a), and reiterates the comment made in *United States v. United States Gypsum Co.,* 333 U. S. 364, that the rule applies to factual inferences from undisputed basic facts.

Two points are significant. In the *Duberstein* case, the Court reversed the lower court on one point where there was merely a finding that there was a gift. The Supreme Court said "Such conclusive, general findings do not constitute compliance with Rule 52's direction to 'find the facts specially and state separately . . . conclusions of law thereon.' While the standard of law in this area is not a complex one, we four think the unelaborated finding of ultimate fact here cannot stand as fulfillment of these requirements." It is submitted that the ultimate finding of the Tax Court in the instant matter, completely without support in the evidentiary findings, is subject to precisely the above quoted criticism.

The second significant point as to *Duberstein* is the attitude of this Circuit on the very feature for which it is cited by the respondent, *i.e.,* the application of Rule 52(a) with respect to factual inferences from basic facts, as that point was analyzed in the *Gypsum* case. This feature was covered in *Gillette's Estate v. Comm.* (C. A. 9), 182 F. 2d 1010, which discussed at some length this Court's review powers in light of the Internal Revenue Code amendment modifying the Dobson rule. In reversing the Tax Court, this Court used language pertinent to that question (quoted in footnote 1 of the appendix to this brief), discussing the United States *Gypsum* case on which Duberstein relies.

It is to be noted the Tax Courts' inferences of fact in the instant matter, far from being drawn from documents or undisputed facts as required in *Gypsum* and also in *Duberstein,* were based on speculation that disregarded the unimpeached and uncontroverted testimony.

The *Gillette* case shows that the effect of this Court's treatment of the lower court's inferences from basic facts is much the same as that of the Third Circuit in *Lehmann v. Acheson*, 206 F. 2d 592, where it was said that the lower court's ultimate finding from evidentiary facts, reached by processes of legal reasoning is actually a legal inference free from the "clearly erroneous" rule. *Weyl-Zuckerman & Co.* (C. A. 9), 232 F. 2d 214, also cited by the respondent, affirmed the Tax Court in a summary opinion and agreed with its view of the facts. This Court again refers to Rule 52(a) and states that so-called inferences are findings of fact within the meaning of the rule. Since an affirmance of the Tax Court was involved, there was no occasion for extended analysis of the rule, and delineation of its limits, as given in the *Gillette* case. Thus, *Weyl-Zuckerman* adds nothing to this Court's prior decisions.

This Court also protects the taxpayer against administrative abuse through unwarranted application of the presumption in favor of the Commissioner's determinations. In *Clark v. Comm.* (C. A. 9), 266 F. 2d 698, cited by the respondent, this Court emphasizes (quotation in footnote 2 of appendix) that such a presumption disappears when the taxpayer introduces evidence contrary to the Commissioner's determination.

The Tax Court Decision.

The facts with respect to the lease on the San Gabriel property were set out fully in the findings. In discussing the execution of the lease by the partnership in 1945, the Court mentions [Tr. 20-21] that Joe Goldstein had previously attempted to buy the land for a market site but had been unable to agree with Torley on terms. The Court omits, however, to mention the uncontroverted testimony favorable to the petitioners, described on page 6 of the opening brief of the petitioners in this proceeding, that Joe Goldstein had been prepared to offer $50,000 for the property but had not offered more than $35,000 when it became apparent in negotiations that Torley would not sell [Tr. 222].

A finding in accordance with this testimony should have been made and would have conflicted with the Court's statement in its opinion [Tr. 29] that Joe Goldstein had refused to pay more than $35,000 for the property when negotiating on behalf of the corporation; the Court apparently misspoke in referring to the corporation since it was only on behalf of the partnership that $35,000 had been offered for the property.

Findings are made [Tr. 22] that the corporate minutes first discussed the purchase of land by the corporation and the reasons why such purchase would be an advantage with respect to a loan and increase of working capital; and that the later minutes stated that it had been decided that the petitioners would buy this land as their private property, and that they may sell it in the future to the corporation. The findings did not mention at this point the substantial reasons for this corporate decision which are discussed on page 7 of the petitioners' opening brief herein, and which are supported by uncontroverted and unimpeached testimony [Tr. 50-54; 109-111; 133-134; 171-172; 236-238]. This testimony clearly brings out that the efforts of the

corporation to buy the land in 1952-1953 were unsuccessful because Torley insisted upon a trade for its own tax reasons, and that the Boys' Market, Inc. directors were not interested in a trade, for reasons which they considered to be decisive and substantial. This testimony was ignored in the findings of the Tax Court.

The undisputed and material testimony as to the value of the property at the time of its purchase by the Boys' Market, Inc. from the petitioners was not reflected in the Tax Court's findings as it should have been. However, the Court appears in its later discussion to recognize that the property could have the $75,000 value if it were not for the lease.

Nothing actually contained in the findings is inconsistent with the petitioners' position until the ultimate conclusion of fact, which appears to have been realistically a legal determination.

The reasons for the corporation's decision in 1953 not to enter into the trade are referred to by the Tax Court in summary fashion with the comment, "Petitioners attempt to explain. . ." [Tr. 27]. The reasons why the corporation wanted to acquire the property, however, and why the transaction was handled as a purchase from its shareholder rather than as a trade with its lessor, are well supported by unchallenged, uncontroverted, unimpeached and plausible testimony. The Tax Court makes a similar comment concerning the petitioners' wish to be relieved of contingent liability under the lease. There was no reason for the Court to discount such testimony except for the fact that interested parties were the witnesses. As clearly appears from the decisions hereinafter discussed, this is not a valid reason for the Tax Court to ignore and discount such evidence. In *Tank v. Comm.* (C. A. 6; 1959), 270 F. 2d 477, the Court said:

> "What we have attempted to do in this treatment of the present review is to point out some of

> the instances which illustrate the tendency of the Tax Court to ignore plain, uncontroverted testimony, and to reach for facts contrary to the testimony without there being any basis in fact for so doing. Certainly, the trier of the facts may disbelieve witnesses. We say, however, that the trier of the facts completely ignored or disregarded what appears to be a substantial quantity of reliable testimony without giving any explanation therefor."

The real question involved in this matter was then discussed by the Tax Court [Tr. 28-29], *i.e.,* the fact that the petitioners made a substantial profit on a transaction by reason of the fact that the purchase price of the property on which the corporation had a lease, was adjusted to reflect the current fair rental value of the property. The Tax Court made its legal determination against the position of the petitioners.

The Tax Court's ultimate finding of fact and conclusion of law appeared to be related in some way, not satisfactorily explained, to its lack of consideration and acceptance of the uncontroverted testimony stating reasons; why the corporation desired to acquire the San Gabriel property; why it did not go into the trade urged by the Torley Land Company, permitting the property to be acquired instead by the petitioners; and why Joe Goldstein had personal reasons to effect a termination of the lease. Also the Court disregarded the value of the land to the corporation. In view of the apparent bearing of these factual considerations upon the Tax Court's decision, it is helpful to examine the principles governing the weight to be accorded uncontroverted testimony, even from interested parties, and the appellate function of the Circuit Court as stated by this Court.

Several later decisions of this Court follow the rationale of *Gillette's Estate,* herein before discussed and quoted at length in footnote 1 of the appendix.

In *Gensinger v. Comm.* (C. A. 9), 208 F. 2d 576, this Court emphasized that the material facts were substantially undisputed, and held in the alternative that the Tax Court applied the wrong rule or that its finding was clearly erroneous. See quotation in footnote 3 of the appendix.

See also *McGah v. Comm.* (C. A. 9), 210 F. 2d 769, and *Hypotheek Land Co. v. Comm.* (C. A. 9), 200 F. 2d 390, where this Court reversed the Tax Court on similar grounds.

A review of the decisions in other circuits shows that direct, uncontroverted and unimpeached testimony of a taxpayer may not be disregarded. The overwhelming weight of authority holds that it must be accepted if credible and consistent with proven facts. In a leading case, *Blackmer v. Comm.* (C. C. A. 2; 1934) 70 F. 2d 255, the Second Circuit (quotation in footnote 4 of appendix) reversed the Board of Tax Appeals' affirmance of the Commissioner's disallowances of business expense deductions.

In *Tank v. Comm.* (C. A. 6; 1959), 270 F. 2d 477, a Tax Court decision concerning reasonableness of salaries, was reversed (quotation in footnote 5 of appendix) on the ground that it was contrary to the unimpeached, competent, relevant and uncontradicted testimony of the petitioner.

In *A & A Tool and Supply Co., et al. v. Comm.* (C. A. 10), 182 F. 2d 300, the Circuit Court reversed a Tax Court decision which had disregarded testimony as to rental value of property, excluded an accountant's testimony, and disallowed deductions for commissions paid. The Court stated that the presumption that the

Commissioner's determination is correct is only one of law and does not constitute evidence; that when evidence is introduced by the taxpayer sufficient for the Tax Court to make finding contrary to the determination the presumption disappears; that when there is substantial evidence to support the findings or when they are clearly erroneous, they must be accepted. It was stated further that the Tax Court may not arbitrarily discredit and disregard unimpeached, competent and relevant testimony of a taxpayer which is uncontradicted. In discussing the rental value of property leased to the corporation by Mrs. Schuster, the president of the company, the Court's observations (quoted in footnote 6 of the appendix) are particularly relevant to the instant matter.

See also *Foran et al. v. Comm.* (C. C. A. 5; 1948), 165 F. 2d 705, and *Schuh Trading Co. v. Comm.* (C. C. A. 7; 1938), 95 F. 2d 404.

The Legal Issue.

Can a majority shareholder, the chief executive of a corporation, sell property to a corporation at its fair market price without incurring federal income tax on a "disguised dividend," if the corporation has a long term lease on the property at a rental figure below the current fair rental value?

It seems to be a matter of first impression, to be decided by this Court, whether a sale by a principal shareholder to the corporation, in circumstances such as described above and involved in the instant matter may give rise to a disguised dividend. No decisions can be found where this exact point has been raised. However, the principle which should be applicable here has been applied frequently in analogous situations. If the corporation receives fair value from the shareholder there can be no disguised dividend, even though the cor-

poration waives legal rights or makes voluntary payment.

For instance, the well recognized principle that a corporation may voluntarily pay compensation for past services to its principal shareholders, who is also an officer, illustrates that a corporation need not rely on technical legal rights in dealing with shareholders in order to avoid the "disguised dividend" theory. In the case of such payment for services in past years, even though there is no agreement nor legal obligation on the part of a corporation, the payment constitutes deductible compensation if the amount is in line with the actual value of the services previously rendered.

The rationale of these decisions governing tax treatment of compensation for past services applies to any dealing between a corporation and its shareholders where the corporation goes beyond what it legally could do, and accords its shareholders treatment consistent with realistic fairness.

The leading case on this question is *Lucas v. Ox Fibre Brush* Co. (1930), 281 U. S. 115, (quotation in footnote 7 of appendix) where the Supreme Court held that compensation voluntarily paid for past services was deductible. This decision has been followed uniformly in later cases: See Prentice-Hall Federal Taxes, Par. 11,580.

The same rationale was used concerning another fact situation in *Hugh Walling* (1953), 19 TC 838, (quotation in footnote 8 of appendix) where cash was paid by a corporation to its shareholders as an adjustment of the valuation of property which the shareholders had contributed to the corporation for their stock. It was held that this payment was not a dividend despite the fact that the corporation was not legally obligated to make the adjustment.

Morris E. Floyd (1955), 14 TCM 835, TC Memo 1955-209, involved a case with similarities to the instant matter. In the *Floyd* case, the petitioner and his wife owned practically all the shares of Floyd and Company, a corporation which was the lessee of property from the Cincinnati Gas & Electric Company. The lessor had agreed to expend $25,000 a year to advertise certain products handled by Floyd and Company as distributor, and also gave the Floyd and Company the right of first refusal before selling the leased property. The property was offered to Floyd and Company in accordance with the first refusal covenant, and the corporation refused the offer. Also the written agreement of the gas company was released and an oral agreement substituted. Thereafter the petitioner bought the leased property, and the Commissioner determined that part of the consideration had been furnished by Floyd and Company. In holding that the waiver of the contract right by the corporation did not constitute distribution of property to the shareholder, the Court used language quoted in footnote 9 of the appendix.

The foregoing observations that waiver of a contract right by a corporation does not constitute distribution of property are especially pertinent to the instant matter. In effect the Boys' Market, Inc. waived its contract right to rent the San Gabriel property for less than fair market rental value. However, in paying $75,000 to the petitioners for property that was worth $75,000, the corporate assets were not diminished. The balance sheet could reflect no distribution.

In *Robert Lehman v. Comm.* (1955), 25 TC 629, a corporation distributed to the shareholders of its parent company warrants entitling the shareholders to buy six cases of whisky for each share of stock owned, at a price the same as that charged to regular customers. The Commissioner contended that the shareholders

realized ordinary income on the profit from sale of such warrants, under the theory that the transaction was an anticipatory assignment of income by the parent; that the profit realized by the shareholders on sale of the warrants was in effect a dividend. In holding that the transaction did not result in a taxable dividend, the Court made comments quoted in footnote 10 of the appendix.

These cases bring out the principle that the courts look only to the actual value of what a corporation receives from a shareholder in exchange for a payment. They do not insist that a shareholder be treated on the same basis as a person unrelated to the corporation. In fact, the rule stated by the Tax Court that the lack of "arms length" relationship between the parties requires a close scrutiny is for the very purpose of insuring that in such cases fair value will be received. Fair market value was received by the Boys' Market, Inc. when it bought the property for $75,000; moreover, the said corporation had a business purpose in acquiring the property. The actual value to the lessee was greater to the lessee than to anyone else [Tr. 101].

The Gregory Principle.

The inapplicability of Gregory v. Helvering, regardless of any inference that might be drawn as to tax savings motives, has been well expressed in the Sun Properties decision quoted at length in previous briefs. The factual difference between Sun Properties and the instant situation, stressed by the respondent and the Tax Court, does not appear to have any relevance to the basic principle, which does apply herein. No valid distinction between the two cases was shown.

The Supreme Court in Gregory was careful to reaffirm that a motive to avoid taxation will not establish tax liability if the transaction without such

motive does not establish liability. The many later decisions that involve the substance v. form question have been equally careful to preserve this basic distinction.

If the transaction in question was real, with substantive legal consequences, then the motive to reduce or avoid tax is immaterial. But if the transaction can be held to be a sham then the form will be disregarded. The effect of the *Gregory* decision was excellently summarized by Judge Learned Hand in *Chisholm v. Comm.* (C. C. A. 2; 1935), 79 F. 2d 14 as quoted in footnote 11 of the appendix.

There can be no question that Joe Goldstein and his wife actually acquired the San Gabriel property; that they had full legal and equitable title thereto; that the corporation as a separate entity had a legal choice whether to accept or refuse the offer by the petitioners to sell the property at the price asked. No legal rights arose between the petitioners and the corporation with respect to the property until an agreement was executed between the parties pursuant to the said offer. The transactions most certainly were real, with substantive legal consequences within the meaning of the Gregory and Chisholm decisions. Although the Gregory principle is inapplicable, no other theory for the Tax Court's determination was ever stated.

Conclusion.

It is respectfully submitted that the decision and judgment of the Tax Court of the United States should be reversed as clearly erroneous or as adduced from an erroneous view of the law.

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APPENDIX.

[1]*Gillette's Estate v. Comm* (C. A. 9), 182 F. 2d 1010:

"[3] It is to be noticed that the Tax Court's statement of the evidence in its 'Memorandum' incorporates the material evidence adduced by petitioner and that the respondent introduced no evidence. The error complained of is asserted to exist in the inferences or conclusions drawn by the Tax Court therefrom. In such circumstances it has been said in cases appealed from district courts that within certain limits we are free, that is, that we have the power (and we would suppose the duty) to draw such inferences or conclusions as we deem proper. . . . And since I. R. C. Sec. 1141(a) has been amended to provide that reviews from Tax Courts shall be in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury, what we have just said is germane here. See Wright-Bernet, Inc. v. Commissioner, 6 Cir., 1949, 172 F. 2d 343. Rule 52(a) of the Rules of Civil Procedure provides that findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. However, as will be seen from a reading of the following passage from the oft-referred to case of United States v. United States Gypsum Co., 1948, 333 U. S. 364, 394, 395, 68 S. Ct. 525, 541, 92 L. Ed. 746, the clearly erroneous doctrine of Rule 52(a) is a limitation on Courts of Appeals and precludes such courts from entirely disregarding the trial tribunal's conclusions and trying the case wholly de novo upon the evidence adduced: 'In so far as (the findings to be considered) * * * are inferences drawn from documents or undisputed facts * * * Rule 52(a) of the Rules of Civil Procedure is applicable. That rule prescribes that findings of fact in actions tried without a jury "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. Since judicial review of findings of trial courts does not have the statutory or constitutional limitations on judicial review of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where "clearly erroneous." The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'

"We have carefully considered the effect on this case of subsection (c)(1) of I. R. C. Sec. 1141 after the above-mentioned amendment to subsection (a) of such section. Does the limitation of power on review to 'modify or to reverse' the Tax Court

only when its decision is 'not in accordance with law' contained in (c)(1) remain effective in the face of the provision in the amended (a) in which the review provided is to be 'in the same manner and to the same extent as [review of] decisions of the district courts in civil actions tried without a jury.'? We think it clear, if there is a conflict, which we doubt, that the appellate power must be construed in conformance with the later enacted (a). In the way we view the evidence in the instant case, as will more clearly be shown hereinafter, the decision is 'not in accordance with law' because we think every part of the substantial evidence properly related to the whole of the evidence points unmistakably to the conclusion that it is wrong. Since we are reviewing the case in the same manner and to the same extent as a decision of the district court, and we are applying all of the elements and limitations mentioned in the Gypsum case, we are of the opinion that clearly a mistake has been made and therefore the decision is 'clearly erroneous.'

"[4] It is commonly stated, and properly so, that due respect should be given to the Tax Court's expertness in tax matters. While in most circumstances such respect would weigh heavily, we are not impressed by it here where the ultimate inference of fact must be as to what the decedent contemplated as the driving reason for his actions regarding his property. In this duty, which does not bring technical tax questions into play, it is in no way derogatory to the Tax Court to say that United States Courts of Appeals are as well equipped to draw inferences as is the Tax Court and for that reason the Tax Court decision calls for little more weight than its logic suggests."

[2]*Clark v. Comm.* (C. A. 9), 266 F. 2d 698:

"If the taxpayer introduces evidence from which the determination of the Commissioner contained in a deficiency notice could be found inaccurate then the presumption disappears. Gertsen v. Commissioner of Internal Revenue (February 27, 1959, page 6), 9 Cir. ...... F. 2d ...... [3 AFTR 2d 931]; Clinton Cotton Mills v. Commissioner of Internal Revenue (1945), 4 Cir., 78 F. 2d 292 [16 AFTR 380], 295; Russell v. Commissioner of Internal Revenue (1939), 1 Cir., 45 F. 2d 100 [9 AFTR 519], 103. See also Niederkrome, et al. v. Commissioner (November 10, 1958, page 3), 9 Cir., 261 F. 2d 643 [2 AFTR 2d 6155]; Lawrence v. Commissioner of Internal Revenue (1944), 9 Cir., 143 F. 2d 456, [32 AFTR 998], 459; Hemphill Schools, Inc. v. Commissioner of Internal Revenue, supra, 964. Thereafter the Commissioner has the burden of proving the existence and amount of the deficiency. Lesly Cohen v. Commissioner of Internal Revenue (April 8, 1959, page 8), 9 Cir., 266 F. 2d 5 [3 AFTR 2d 1164]. The tax court's determination must then rest on all of the evidence introduced and its ultimate determination must find support in credible evidence. Union Stock Farms v. Commissioner of Internal Revenue (March 9, 1959, page 19), 9 Cir., 265 F. 2d 712 [3 AFTR 2d 952]."

[3]*Gensinger v. Comm.* (C. A. 9), 208 F. 2d 576:

"[12, 13] We are mindful that findings of the Tax Court on questions of fact are conclusive unless clearly erroneous. Grace Bros., Inc. v. Commissioner of Internal Revenue, 9 Cir., 173 F. 2d 170. But the facts material to the question whether the taxpayer distributed the apricot and peach crops to himself were substantially undisputed. The question whether a distribution was effected, as we see it, depends simply on what the taxpayer actually intended, with a requirement that his intention be objectively manifested in some manner. We think the error of the Tax Court was in applying a stricter rule. But if this was not the error, then we think the finding of the Tax Court on the question was clearly erroneous."

[4]*Blackmer v. Comm.* (C. C. A. 2, 1934), 70 F. 2d 255:

"When the evidence before the Board, as the trier of the facts, ought to be convincing, it may not say that it is not. *Sioux City Stockyard Co. v. Comm.,* 59 F. (2d) 944 (C. C. A. 8); *Conrad & Co. v. Comm.,* 50 F. (2d) 576 (C. C. A. 1); *Chicago Ry. Equipment Co. v. Blair,* 20 F. (2d) 10 (C. C. A. 7). And the Board may not arbitrarily discredit the testimony of an unimpeached taxpayer so far as he testifies to facts. A disregard of such testimony is sufficient for our holding that the taxpayer has sustained the burden of establishing his right to a reduction and error has been committed in a contrary ruling. *Boggs & Buhl v. Comm.,* 34 F. (2d) 859 (C. C. A. 3)."

[5]*Tank v. Comm.* (C. A. 6, 1959), 270 F. 2d 477:

"The Tax Court cannot reject the evidence of all of the witnesses and, upon a record containing no evidence to support its decision, make a determination that salaries are excessive. *J. H. Robinson Truck Lines v. Commissioner,* 183 F. 2d 739 (39 AFTR 788). 'Since the Commissioner offered no evidence, the petitioner was denied the opportunity of examining the correctness of his computations; and was left to stand upon its own proof, none of which was refuted. Therefore, we think, the burden of presenting evidence to rebut any presumption in favor of the Commissioner's findings were fully met, and the Tax Court clearly erred in finding that the salaries were unreasonable.' "

[6]*A & A. Tool and Supply Co., et al. v. Comm.* (C. A. 10), 182 F. 2d 300:

"The Commissioner determined that $600 per year was a reasonable rental for the premises occupied by the taxpayer and allowed that amount as an expense deduction. The taxpayer claimed that a reasonable annual rental was $3,000. This was the issue before the Tax Court. Mrs. Schuster testified that she was the owner of the property. That it consisted of 19 lots 140 feet deep with a frontage of 655 feet upon which was a metal warehouse equipped with racks and hoists on the inside and a

loading dock on the outside and a modern five room residence which was occupied by the taxpayer's manager; that she was acquainted with the property and had made an investigation of rentals in that neighborhood; that she was President of the corporation which occupied the premises and participated daily in the conduct of its business; that in her opinion $3,000 per annum was a fair rental value for the property. This was the only evidence before the Tax Court as to the reasonable rental value of the property. The Tax Court stated that Mrs. Schuster's testimony was not entitled to much weight. We agree that the evidence was far from satisfactory but she was the owner of the property and had sufficient knowledge of the same to testify as to its reasonable rental value. With this evidence in the record, we cannot conclude that there was no substantial evidence from which the tax court could make a finding of the reasonable rental value. The presumption that the Commissioner's determination is correct is one of law; it is not evidence and may not be given weight as such. *N. Y. Life Ins. Co. v. Gamer,* 303 U. S. 161, 171, 58 S. Ct. 500, 82 L. Ed. 726, 114 A. L. R. 1218. When evidence is introduced by the taxpayer sufficient for the Tax Court to base a finding contrary to the determination, the presumption disappears. *Crude Oil Corp. of Am. v. Commissioner,* 10 Cir., 161 F. 2d 809; *Mayson Manufacturing Co. v. Commissioner,* 6 Cir., 178 F. 2d 115, 121. The Tax Court and the Board of Tax Appeals, which it succeeded, was created to afford a taxpayer an independent forum where he could be heard speedily, equitably and impartially on a tax assessment which he thought had been improperly levied or assessed. Its function is to weigh evidence on matters properly before it and make findings of fact thereon, and when there is substantial evidence to support the findings or when they are not clearly erroneous they must be accepted. *Helvering v. Kehoe,* 309 U. S. 277, 60 S. Ct. 549, 84 L. Ed. 751. It may not arbitrarily discredit and disregard unimpeached, competent and relevant testimony of a taxpayer which is uncontradicted. There was sufficient evidence as to this item to overcome the presumption of correctness of the Commissioner's determination and the Tax Court should not have disregarded it."

[7]*Lucas v. Ox Fibre Brush Co.* (1930), 281 U. S. 115:

"The payments in the present instance were actually made in the year 1920. The expenses represented by these payments were incurred in that year, for it is undisputed that there was no prior agreement or legal obligation to pay the additional compensation. This compensation for past services, it being admitted that it was reasonable in amount in view of the large benefits which the corporation has received as the fruits of these services, the corporation had a right to pay, if it saw fit. There is no suggestion of attempted evasion or abuse. The payments were made as a matter of internal policy having appropriate regard to the advantage of recognition of skill and fidelity as a stimulus to continued effort. There was nothing in the income tax law to preclude such action."

[8]*Hugh Walling* (1953), 19 T. C. 838:

"The action of the Corporation, recognized this adjustment by putting journal entries on its books, as of December 31, 1946, increasing the value of such assets and recording a liability in the same amount to petitioner, as a direct result of such adjustments by the respondent. In effect, there was a reformation of the contract of September 16, 1946. While it may be true that the Corporation was not legally obligated to make such adjustment, there is no prohibition against parties to a contract amending it, and that is what occurred in this case."

[9]*Morris E. Floyd* (1955), 14 T. C. M. 835, T. C. Memo. 1955-209:

"Respondent also determined that the waiver by Floyd and Company of its right to purchase the property constituted a distribution to petitioners, but in his brief respondent has offered no explanation for this holding. The facts are briefly as follows. The lease between the Gas Company and Floyd and Company provided that if during the term of the lease the Gas Company desired to sell the property it would afford Floyd and Company an opportunity to make an offer for the property before entertaining any other offers. The Gas Company offered to sell the building to Floyd and Company for $19,000. The board of directors of Floyd and Company, because they were contemplating taking on the Bendix washer and needed working capital and because they saw no real advantage in the purchase, rejected the offer on September 14, 1948. This left the Gas Company free to offer the property to any other person, firm or corporation, and Floyd contracted on October 18, 1948 to purchase the building for $19,000. The price was later reduced to $11,000 because the walls were found to be defective. By declining to purchase the premises for $19,000 Floyd and Company did not bestow a property right upon petitioners, and regardless of whether petitioners made a good bargain, the transaction did not include a taxable distribution of income."

[10]*Robert Lehman v. Comm.* (1955), 25 T. C. 629:

"The 'bargain' nature of the transaction arises out of the fact that the purchasers were, because of price fixing regulations in effect at that time, able to immediately resell the whiskey at a higher price. Although a real economic benefit was conferred upon the stockholders of Park & Tilford, Inc., a benefit similar in nature was conferred upon the regular customers of the Import Corporation to whom it sold whiskey at the same price. Not every such benefit conferred upon a stockholder is to be regarded as resulting in the distribution of a dividend. The Supreme Court, in *Palmer v. Commissioner,* 302 U. S. 63, 69 (1937) (37-2 USTC Par. 9532), has stated the rule as follows:

" '* * * While a sale of corporate assets to stockholders is, in a literal sense, a distribution of its property, such a transaction does not necessarily fall within the statutory definition of a divi-

dend. For a sale to stockholders may not result in any diminution of its net worth and in that case cannot result in any distribution of its profits.' "

[11]*Chisholm v. Comm.* (C. C. A. 2, 1935), 79 F. 2d 14:

"The Commissioner believes that the situation falls within *Gregory v. Helvering,* 293 U. S. 465, 55 S. Ct. 266, 79 L. Ed. 596. It is important to observe just what the Supreme Court held in that case. It was solicitous to reaffirm the doctrine that a man's motive to avoid taxation will not establish his liability if the transaction does not do so without it. It is true that the court has at times shown itself indisposed to assist such efforts, *Mitchell v. Board of Commissioners of Leavenworth County,* 91 U. S. 206, 23 L. Ed. 302, and has spoken of them disparagingly, *Shotwell v. Moore,* 129 U. S. 590, 9 S. Ct. 362, 32 L. Ed. 827; but it has never, so far as we can find, made that purpose the basis of liability; and it has often said that it could not be such. The question always is whether the transaction under scrutiny is in fact, what it appears to be in form; a marriage may be a joke; a contract may be intended only to deceive others; an agreement may have a collateral defeasance. In such cases the transaction as a whole is different from its appearance. True, it it always the intent that controls; and we need not for this occasion press the difference between intent and purpose. We may assume that purpose may be the touch stone, but the purpose which counts is one which defeats or contradicts the apparent transaction, not the purpose to escape taxation which the apparent, but not the whole, transaction would realize. In *Gregory v. Helvering,* supra, 293 U. S. 465, 55 S. Ct. 266, 79 L. Ed. 596, the incorporators adopted the usual form for creating business corporations; but their intent, or purpose, was merely to draught the papers, in fact not to create corporations as the court understood that word. That was the purpose which defeated their exemption, not the accompanying purpose to escape taxation; that purpose was legally neutral. Had they really meant to conduct a business by means of the two reorganized companies, they would have escaped whatever other aim they might have had, whether to avoid taxes, or to regenerate the world."